SUPREME COURT, U. S.

AUG 25 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 476

SEARS, ROEBUCK AND CO., *Petitioner*,

v.

CARPET, LINOLEUM, SOFT TILE AND RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO, *Respondent*,

and

CLYDE F. WAERS, REGIONAL DIRECTOR OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF AMERICAN RETAIL FEDERATION TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

AND

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

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Comes Now the American Retail Federation (hereinafter called "Federation"), by its attorneys, Brice L. Bishop and Phil B. Hammond, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae* supporting the position of the Petitioner, Sears, Roebuck and Co., and urging the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit for the following reasons:

1. The Federation is an organization composed of 78 national and state retail associations. The membership of these associations consists of 800,000 retailers with approximately six million employees working in small local stores to large national chains. The Federation's interest is based on the broad and far-reaching effect on retailers and other employers which will occur if the decision of the Court below is allowed to stand.

2. The Federation has appeared as *amicus curiae* before this Court in labor relations matters which have affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved: the appropriate standards for determining who is an independent contractor under the National Labor Relations Act[1]; the appropriateness of state courts granting injunctive relief in cases of shopping center picketing;[2] and the Board's lack of authority to compel employers to bargain based on Union authorization cards unless the conduct of a fair election is impossible.[3]

The unwarranted and prejudicial deprivation of rights of retailers and other employers in judicial proceedings for temporary injunctive relief from secondary boycotts is a matter of substantial concern to the members of the Federation. If the decision of

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[1] Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America*, 390 U.S. 254 (1968).

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc., and Weis Markets Inc.*, 391 U.S. 308 (1968).

[3] Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB*, — U.S. —, 23 L. Ed. 2d 547 (1969) and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.*, — U.S. —, 23 L. Ed. 2d 547.

the Tenth Circuit is allowed to stand, employers will not have access to any forum for relief since they are already denied access to state courts under pre-emption doctrines.

3. The Federation has had an opportunity to study the Petition for Writ of Certiorari filed by Sears, Roebuck on August 15, 1969. In addition to the cogent arguments made by Sears, the Federation will make further important arguments regarding the application of the legislative history to the question involved and will compare other Courts of Appeals cases which are in conflict with the decision of the court below.

The Federation further believes that its unique experience may be helpful to the Court in determining the great public importance of the issues raised by the denial to employers of valuable rights intended to be exercised as part of the statutory scheme of the National Labor Relations Act.

4. The effect upon retailers of the determination whether an aggrieved charging party may appeal the District Court's refusal to grant injunctive relief under Sec. 10(l) of the National Labor Relations Act when the Board's Regional Director is unwilling to do so, would be widespread and considerable as retailers have been involved in numerous litigated matters involving secondary picketing.[4]

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[4] See, e.g., the factual situations involved in *N.L.R.B.* v. *Local 25, I.B.E.W.*, 351 F. 2d 593 (2d Cir. 1965); *N.L.R.B.* v. *Building Service Employees*, 376 F. 2d 131 (1st Cir. 1967); *Local 140, Furniture Workers* v. *N.L.R.B.*, 390 F. 2d 495 (2nd Cir. 1968); *Honolulu Typographical Union* v. *N.L.R.B.*, 401 F. 2d 952 (D.C. Cir. 1968); *Hoffman* v. *Typographical Union Local 37*, 243 F. Supp. 970 (D.C. Hawaii 1965); *Squillacote* v. *Building Trades Council*, 266 F. Supp. 971 (E.D. Wisc. 1967); *Penello* v. *Drivers Local 639*, — F. Supp. —, 68 LRRM 2222 (D.C. 1968); *Roywood*

5. Counsel for Petitioner and the National Labor Relations Board consented to the Federation's filing an *amicus* brief. Copies of the letters of consent have been filed with the Clerk. By letter dated August 14, 1969, counsel for Respondent, Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO, refused to grant such consent.

6. Because it is reasonable to expect that retailers in the future will be subject as they have in the past to picketing proscribed by Sec. 10(l) of the Act, the effect of the Circuit Court's decision in the instant case will substantially deny to the Federation's members the full rights intended to be conferred upon charging parties. If permission is granted to file an *amicus* brief, the brief will be short and relevant so that the Court's time will not be misspent.

Respectfully submitted,

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Corp. v. *Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968); *Local 1238, Carpet, Linoleum & Soft Tile Layers*, 160 NLRB No. 39 (1966); *Columbus Building & Trade Council*, 164 NLRB No. 79 (1967); *Milk Wagon Drivers, Local 753*, 164 NLRB No. 116 (1967); *Teamsters, Local 294*, 173 NLRB No. 234 (1969).

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BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN RETAIL FEDERATION IN SUPPORT OF THE PETITION OF SEARS, ROEBUCK AND CO. FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation"), is an organization composed of seventy-eight national and state retail associations. The membership of these associations

consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation has appeared as *amicus curiae* before this Court in labor relations matters which have affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved: the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriateness of state courts granting injunctive relief in cases of shopping center picketing;[2] and the Board's lack of authority to compel employers to bargain based on Union authorization cards unless the conduct of a fair election is impossible.[3]

The subject matter of the instant case—the unwarranted and prejudicial deprivation of rights of an employer in judicial proceedings for temporary injunctive relief from secondary boycotts—is a matter of substantial concern to the Federation.[4] In 1947

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[1] Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America*, 390 U.S. 254 (1968).

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc., and Weis Markets, Inc.*, 391 U.S. 308 (1968).

[3] Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB*, — U.S. —, 23 L. Ed. 2d 547 (1969) and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.*, — U.S. —, 23 L. Ed. 2d 547.

[4] The Federation has frequently called to the attention of Congress its views on the subject of secondary boycotts. E.g., *Hearings Before the Special Committee on Labor, Committee on Education*

and 1959, Congress sought to protect neutral bystanders from becoming embroiled in the labor disputes of others by enacting the Taft-Hartley and Landrum-Griffin amendments to the National Labor Relations Act. Notwithstanding this legislation, however, many unions continue to resort to unlawful secondary conduct to achieve their goals.[5] Retail establishments, in particular, have frequently fallen prey to such tactics.[6]

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and Labor, on H. R. 11725, House, 90th Cong., 1st Sess. (1967); *Hearings Before the Subcommittee on the Separation of Powers, Committee on the Judiciary, on Congressional Oversight of Administrative Agencies (NLRB),* Senate, 90th Cong., 2nd Sess. (1968). Similarly, the Federation has presented its position on other matters involving the administration of the Act to both Congress and this Court. E.g., *Hearings Before the Subcommittee on Labor, Committee on Labor and Public Welfare, on S. 256,* Senate, 89th Cong., 1st Sess. (1965); *Hearings Before the Subcommittee on Labor, Committee on Education and Labor, on H. R. 77, H. R. 4350 and Similar Bills,* House, 89th Cong., 1st Sess. (1965).

[5] Of the total unfair labor practice charges filed against unions under Section 8(b) of the Act during NLRB fiscal years 1967 and 1968, *32 per cent, or nearly 3700 charges,* involved alleged violations of the secondary boycott provisions of Section 8(b)(4). *Thirty-second Annual Report of the National Labor Relations Board,* p. 218 (1967); *Summary of Operations of NLRB General Counsel,* reprinted in 70 LRR 459 at 468 (1969). In the event that the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) of the Act to petition a United States District Court for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

[6] See, e.g., the factual situations involved in *N.L.R.B.* v. *Local 25, I.B.E.W.,* 351 F. 2d 593 (2d Cir. 1965); *N.L.R.B.* v. *Building Service Employees,* 376 F. 2d 131 (1st Cir. 1967); *Local 140, Furniture Workers* v. *N.L.R.B.,* 390 F. 2d 495 (2nd Cir. 1968); *Honolulu Typographical Union* v. *N.L.R.B.,* 401 F. 2d 952 (D.C. Cir. 1968); *Hoffman* v. *Typographical Union, Local 37,* 243 F. Supp. 790 (D.C. Hawaii 1965); *Squillacote* v. *Building Trades*

With the concomitant remedial limitations placed upon picketing arguably subject to relief under Section 10(l),[7] employers more than ever find that Section 10(l) affords the only remedy to proscribe peaceful picketing.[8]

This case raises, therefore, recurrent and important questions of first impression involving an area of vital interest to the retail industry and all employers. The injunctive protection afforded by Section 10(l) of the Act extends to secondary boycotts as well as unlawful union recognitional picketing and improper "hot-cargo" agreements.[9] A District Court ordered tem-

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Council, 266 F. Supp. 971 (E.D. Wisc. 1967); *Penello* v. *Drivers Local 639*, — F. Supp. —, 68 LRRM 2222 (D.C. 1968); *Roywood Corp.* v. *Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968); *Local 1238, Carpet, Linoleum & Soft Tile Layers*, 160 NLRB No. 39 (1966); *Columbus Building & Trade Council*, 164 NLRB No. 79 (1967); *Milk Wagon Drivers, Local 753*, 164 NLRB No. 116 (1967); *Teamsters, Local 294*, 173 NLRB No. 234 (1969).

[7] II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

[8] *Amalgamated Food Employees Union, Local 590*, v. *Logan Valley Plaza, Inc. and Weis Markets, Inc.*, 391 U.S. 308 (1968).

[9] The number of unfair labor practice charges alleging union recognitional picketing in violation of Section 8(b)(7) has been increasing substantially. Between NLRB fiscal years 1966 and 1967, for example, the number of such charges rose 39 percent. *Thirty-second Annual Report of the National Labor Relations Board, supra* at 218; *Thirty-first Annual Report of the National Labor Relations Board*, p. 186 (1966). As in the case of charges alleging unlawful secondary boycotts, if the Board finds reasonable cause to believe that such charges are true and that a complaint should issue, it is *required* under Section 10(l) to petition for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

porary injunction[10] is the only bulwark available to employers subjected to such unlawful union pressures.[11] A dilution of this protection, such as that which will be occasioned by the decision below, fosters the very industrial strife the Act was designed to prevent and may mean enforced capitulation by employers who are denied access to state courts under preemption doctrines and who have now been denied relief in the only forum left available to them.

Such a paradoxical result is also at odds with the constitutional requirements of fairness and pro-

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[10] Injunctive relief under Sec. 10(l) is designed to provide interim relief until the permanent injunction is obtained under Sec. 10(e) or (f). In the instant case, the Union has petitioned the Court of Appeals of the District of Columbia under Sec. 10(f), the Board has cross-filed under Sec. 10(e) and Sears has moved to intervene. (*Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union No. 419, AFL-CIO* v. *National Labor Relations Board*, C.A.D.C. No. 23223, filed July 3, 1969) If the decision of the 10th Circuit in the instant case is allowed to stand, a successful employer before the Board would be placed in the anomalous position of having participatory rights to obtain permanent injunctive relief under *Scofield* but yet denied the interim relief provided by Congress in Sec. 10(l) during the protracted course of the unremedied picketing.

[11] The protection afforded to an employer from unlawful picketing through a Board initiated action for a permanent injunction is more illusory than real. The length of time required for the Board to issue complaint, for the Board Trial Examiner and the Board itself to rule on the complaint and for a Court of Appeals then to enforce any resultant Board order largely negates the value to the picketed employer of such a proceeding. In the instant case, for example, the Union commenced its picketing of Sears on August 7, 1968 and the picketing still continued after the Board order of June 20, 1969. (See Motion for Injunction Pending Appeal, Record, page 11, et seq.) A petition in the Court of Appeals to review the Board's order finding that such picketing was unlawful was only recently filed and has not yet been briefed or argued.

cedural due process which permeate all valid Congressional enactments. And, finally, the decision below sharply conflicts with the expanding awareness of other courts to the essential rights of Board charging parties to participate in proceedings governing their essential interests.

REASONS FOR GRANTING THE WRIT

1. *The present case raises significant issues in the administration of the Act which should be resolved by the exercise of this Court's "general power to supervise the administration of justice in the federal courts."* *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260.

This Court has determined that "both the successful charged party (in Scofield) and the successful charging party (in Fafnir) have a right to intervene in the Court of Appeals proceeding which reviews or enforces Labor Board orders." *United Automobile Workers* v. *Scofield*, 382 U.S. 205, 208. It has not, however, determined the corollary and equally-important extent to which charging parties either may participate in proceedings by the Board for temporary injunctive relief or may participate in subsequent appellate review of such proceedings. Left unanswered by the Court, therefore, are such significant issues as the rights of charging parties to participate as "parties" in such District Court proceedings;[12] to

[12] This question is presently pending before the Court of Appeals for the Third Circuit in *Samoff* v. *International Association of Machinists, District Lodge No. 1 (Terminal Handling Co.)*, Nos. 17,907 and 17,910, where the District Court, notwithstanding the express rights of participation accorded charging parties by Section (10(l), nevertheless ruled that the charging parties there involved did not constitute "parties" and, accordingly, lacked standing to object to a proffered Board stipulation.

obtain relief from the District Court when the Board chooses not to pursue its petition;[13] to prosecute an appeal from an adverse District Court decision when, as in the instant case, the Board declines to do so; to participate as a party or intervene in appellate proceedings before the Courts of Appeals;[14] or to file a petition for certiorari before this Court.[15] The instant

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[13] See *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.*, 351 F. 2d 525 (C.A. 9, 1965), in which case the Ninth Circuit affirmed the issuance of an injunction under Section 10(l), at the urging of the charging party and over the objection of the Board Regional Director, where the charging party "merely supported the original petition for injunctive relief requested by the Regional Director."

[14] The Ninth Circuit has declined to allow a *successful* charging party to intervene in an appeal from the granting of a 10(l) injunction *(San Francisco-Oakland Newspaper Guild* v. *Kennedy*, — F. 2d —, 69 LRRM 2535 (1969), *cert. den.* — U.S. —, 69 LRRM 2537 (1968)) while the Second and Sixth Circuit have, conversely, apparently permitted such intervention. *McLeod* v. *General Electric Co.*, 366 F. 2d 847 (2nd Cir., 1966); *N.L.R.B.* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir., 1967).

[15] Only if the charging party is accorded the status of a "party" or "intervenor" in the Court of Appeals, as permitted by the decisions of the Second and Sixth Circuits noted in the preceding footnote, may he seek certiorari from an adverse decision of the Court of Appeals. *United Automobile Workers* v. *Scofield, supra* at 214. The importance of the right to petition for certiorari is underscored by this Court's decision in *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1963). In that case, the charged union, which had been cleared of a Section 8(b)(4) charge by the Board, was found by the Second Circuit to have violated the Act. The union, which had been allowed intervention in the Court of Appeals, sought and obtained certiorari when the Board declined to file such a petition. On the merits, this Court then unanimously reversed the Second Circuit. Had the charged party, or a charging party in the converse but analogous situation here involved, not been accorded intervention rights, there would have been no opportunity for this Court's remedial review.

case provides the Court with an appropriate vehicle to resolve these important and recurring questions.

2. *The decision below infringes on the right of charging parties to procedural fairness and due process.*

It is axiomatic that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967), quoting *Rusk* v. *Cort*, 369 U.S. 367, 380 (1962). As Mr. Justice Brandeis observed in *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (concurring opinion):

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."

The legislative history of Section 10(l), as well as its express language, reveals that Congress did not intend to preclude charging parties' access to judicial review. Section 10(l) was, in effect, a compromise between the House bill, as well as the Ball amendment in the Senate, which would have permitted private parties to direct the conduct of their own injunction proceedings[16] and the opposition to such proposals

[16] The House Bill provided for 10(l) injunctions at the instance of private parties rather than the Board, and the Ball amendment similarly permitted private parties "to control [their] own litigation . . . [rather than permit] some official of the Board . . . [to] decide whether in his discretion, rather than in the discretion of the man who claims to be injured, the litigation should be filed." *Legislative History of the Labor Management Relations Act*, 1947, pp. 561, 1353.

which would have precluded employers from independently choosing the forum, selecting the theories of violation and relief and actually initiating such suits.[17] The result was that Section 10(l) was intended to accommodate both "public" and "private" interests. Private parties were provided with both a meaningful remedy—injunctive relief—and a right of full participation once a mandatory injunction suit has been commenced before the Board. In addition, Section 10 (h) was enacted to exempt from the Norris-LaGuardia Act *all* federal court proceedings authorized by Section 10 of the Act, including both the review and enforcement proceedings involved in *Scofield* and the 10(l) proceedings here involved.[18]

The Congressional objective of full participation by a charging party, once the Board has initiated a 10(l) suit, sharply conflicts with foreclosing the access of charging parties to judicial review. It is no answer to such denial to argue that the right to appeal from an erroneous District Court decision is precluded because the statutory language only mentions the right "to appear by counsel and present any relevant testi-

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[17] See, e.g., *Legislative History of the Labor Management Relations Act*, 1947, pp. 1057-8, 1347-70.

[18] The decision below presupposes a conflict between the grant of appellate rights to a charging party and the prohibitions of the Norris-LaGuardia Act. But participation by the charging party in *Scofield*—where the scope of the injunctive relief was permanent rather than temporary as in a 10(l) proceeding and the risk of potential conflict, accordingly, all the more serious, did not conflict with the Norris-LaGuardia Act for the same reason that such participation in this case does not. Section 10(h), which removes *all* Section 10 proceedings from the limitations of the Norris-LaGuardia Act, uniformly applies to a 10(l) proceeding as well as to a 10(e) review proceeding.

mony."[19] The right to full participation in the initial stages of an adjudicatory proceeding necessarily implies the opportunity to invoke and participate in appellate judicial review.[20] This Court in *Scofield* recognized that the statutory design interblends public and private rights and that considerations of procedural fairness and due process, as well as Congressional intent, require that intervention rights be accorded to *successful* charging parties in Board enforcement proceedings. The same considerations also require that *unsuccessful* charging parties in 10(l) proceedings be granted similar rights, particularly where, unless accorded such rights, they will have no effective recourse available to protect their vital interests.[21]

In 1959, Congress again afforded relief to employers subject to picketing pressures. The floor debates which now form the legislative history of the Landrum-Griffin amendment show a primary concern to protect

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[19] This same argument was rejected in *Scofield* where this Court found that the absence of specific language providing for intervention in Section 10(f) review proceedings did not indicate that Congress intended to preclude such intervention. 382 U.S. at 209-10.

[20] Cf., e.g., *Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353; *Lane* v. *Brown*, 372 U.S. 477.

[21] The eventual determination of the merits of the charge, as Congress recognized when it enacted Section 10(l), fails to provide a practical remedy for the employer faced with injurious unlawful picketing. See footnote 6, *supra*. Moreover, as in the instant case, participation in a much later enforcement proceeding is clearly no substitute for participation in the 10(l) proceeding nor will it in any way suffice to protect the substantial interests of the charging party involved therein. Cf. *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327. The problem is amply illustrated in the instant case where the District Court Judge, believing that the General Counsel would lose its case before the Board, refused to grant

neutral employers such as the Petitioner in the instant case from secondary boycotts. The debates are replete with statements such as those by:

Senator Curtis:

> "Some of the most flagrant practices of labor racketeers are made possible by the inadequacy of the existing secondary boycott provisions."

Senator Goldwater:

> "If we do not prohibit secondary boycotts, as was intended by the Taft-Hartley Act; if we allow blackmail picketing to continue, we shall not have an effective labor bill."

Senator Morse:

> "The Landrum-Griffin bill was intended to be an effective and efficient instrument for closing the (secondary boycott) loopholes about which employers have rightly complained."

Senator Ervin:

> "There is a need for a clarification of the law affecting secondary boycotts; indeed there is a crying need for such legislation."

Senator Dirksen:

> "I want (secondary boycotts) stopped. So does America."[22]

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the injunction. His opinion of the case however, was not at any time shared by the Board which later found that the Union had engaged in an unlawful secondary boycott. Thus, though it was ultimately determined that the employer had been wronged, he was precluded from obtaining the statutory remedy to which he is entitled in Section 10(l) of the Act by the Circuit Court's refusal to grant him standing to appeal the District Court's erroneous decision. Few retailers could have withstood picketing for almost a year.

[22] II, *Legislative History of the Labor-Management Reporting Act of 1959*, pps. 989, 1376, 1425, 1446, 1842 (1959).

3. The decision below conflicts with the recognition accorded by other courts to the fundamental right of Board charging parties to participate in proceedings governing their essential interests.

This Court's decision in *Scofield* recognized the legitimate role of charging parties in judicial proceedings arising from their charges, a role which "will not impair effective discharge of [the Board's] duties and may well promote the public interest." Such participation permits "all relevant material" to be brought to the attention of the appellate court, makes for "more meaningful" briefs and, of perhaps particular relevance to the instant case, guarantees "that the Board interpretation of the relevant provisions accords with the intent of Congress." 382 U.S. at 215, 219.

The Board has similarly acknowledged that participation by charging parties in 10(l) proceedings serves the public interest:

> "Section 10(l) of the Act . . . provides for the participation of the charging party in the injunction action. A record has not yet been made, and the participation of the charging party may be helpful in the development of it." Brief for the National Labor Relations Board in *United Automobile Workers* v. *Scofield*, *supra* at p. 19, n. 13.

The *Scofield* decision also recognized that participation by charging parties in judicial proceedings is necessary to protect their rights when the Board reevaluates its position during the pendency of a case. In such a situation, the Board General Counsel "cannot be expected wholeheartedly to attempt to convince an appellate court of the correctness of a doctrine

which the Board itself has abandoned." 382 U.S. at 215, n. 7.

These considerations are all the more pertinent where the Board, as in the present case, declines to seek appellate review for reasons which may be wholly unrelated to the merits of the controversy. Access to such review by the charging party then becomes fundamental to the protection of both the vital private and public interests involved. As Professor Jaffe observed:

> "The union [in *Scofield*] suggested that if allowed to intervene it could seek Supreme Court review of an adverse decision though the Board were indifferent or opposed. And why not? *If the statute allows a party to appeal from an adverse Board decision why not from an adverse judicial ruling?* I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. *But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection.*" Jaffe, Judicial Control of Administrative Action, p. 545 (1965) (emphasis supplied; footnote omitted).

A failure to appreciate the "central interest" of the charging party, and a concomitant idolatry of the Norris-LaGuardia Act, are the hallmarks of the decision below. The decision therefore collides with the teachings of this Court in *Scofield*. It is contrary to the intervention rights permitted charging parties by the Second and Sixth Circuits[23] and the expanding rights of charging parties generally recognized by the

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[23] *McLeod* v. *General Electric Co., supra; NLRB* v. *Nashville Building & Construction Trades Council; supra.*

Third Circuit,[24] the Board itself[25] and Congress.[26] The decision conflicts with *Houston Insulation Contractors Association* v. *NLRB*, 339 F. 2d 868 (5th Cir., 1964), where, *at the instance of the charging party and over the objection of the Board*, the Fifth Circuit stayed a Board order and continued in effect a 10(l)

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[24] *Leeds and Northup* v. *NLRB*, 357 F. 2d 627 (3rd Cir., 1966).

[25] See, e.g., *Spector Freight System, Inc.*, 141 NLRB 1110 (1963). In addition, the Board's Rules and Regulations provide that "parties", which are expressly defined to include "any party filing a charge", are permitted during Board hearings to "call, examine, and cross-examine witnesses . . . to introduce evidence into the record . . . [and to] submit briefs, engage in oral argument, and submit proposed findings and conclusions . . ." Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Series 8, As Amended, Secs. 102.8 and 101.10 (1968). The retention of these provisions, despite a recommendation by an external investigating committee that charging parties not be designated as "parties" before the Board, clearly signifies that the Board considers full participation by charging parties to be administratively desirable. Comment, *The Charging Party Before the NLRB: A Private Right in the Public Interest*, 32 U. Chi. L. Rev. 786, 791, n. 33 (1965).

[26] This Court in *Scofield*, for example, found "helpful analogies" in the Judicial Review Act of 1950, 5 U.S.C. §§ 1031-42 at § 1038, and the then-existing provisions of Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a)(2) has subsequently been amended to offer an even more compelling analogy in support of the charging parties' right to intervene:

> "*Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

injunction.[27] And it is diametrically opposed to the construction of Section 10(l) by the Ninth Circuit in *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc., supra,* which emphasized the critical distinction between a charging party independently petitioning for injunctive relief, or seeking relief different from that sought by the Regional Director, and the charging party merely supporting the Board's original petition for injunctive relief. In the latter case, that Court, in marked contrast to the court below, found no inconsistency "in allowing the 'public' interest to be represented by the 'private' charging parties when the representative of the NLRB is either unable or unwilling to do so."

The application of *Scofield* to Section 10 injunction proceedings should be resolved by this Court. The conflict which exists between the decision below and the decisions of the Second, Third, Fifth, Sixth and Ninth Circuits involving rights of substance and importance also requires this Court's review and harmonization.

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[27] The main thesis of the dissent in *Houston Insulation* was that, by virtue of the Norris-LaGuardia Act, the Court lacked jurisdiction "to grant the private petitioner's motion for stay and thereby to reinstate the [10(l)] injunction or continue it in force." It thus mirrors closely the decision below and highlights the sharp conflict which exists between the Fifth and Tenth Circuits.

CONCLUSION

For the foregoing reasons, the Federation urges that the petition for writ of certiorari should be granted.

Respectfully submitted,

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